A

## KOPERAL ZAINAL MOHD ALI & ORS v. SELVI NARAYAN & ANOR

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
ZALEHA YUSOF JCA
B SURAYA OTHMAN JCA
[CIVIL APPEAL NO: W-01(NCVC)(W)-36-01-2017]
23 APRIL 2018

C ***DAMAGES:*** *Appeal – Appeal against award made – Death in police custody – Negligence of police – High Court granted RM200,000 as exemplary damages – Whether sum awarded fair and reasonable – Whether High Court acted upon wrong principle of law in making award*

D ***TORT:*** *Negligence – Death in police custody – Damages – Award of RM200,000 granted as exemplary damages to lawful administrators of estate of deceased – Appeal against award – Whether sum awarded fair and reasonable – Whether High Court acted upon a wrong principle of law in making award*

E Chandran Perumal ('the deceased') was arrested on 6 September 2012 and detained by the police on suspicion of being involved in the kidnapping of a new born baby. He was found dead in his cell on 10 September 2012. A post mortem revealed that the cause of death was hypertensive heart disease. The report of the post mortem also revealed that his stomach was empty because he had not eaten any food and taken any medication. There were also signs of injuries on the deceased's body. In an inquest that was conducted into the deceased's death, the coroner concluded that the deceased had needlessly F died and that the death of the deceased was due to the negligence, omission and dereliction of duties on the part of the police. The High Court Judge ('the HCJ') found the defendants ('the appellants') liable for negligence and public misfeasance. The HCJ allowed all the reliefs sought for by the lawful administrators of the estate of the deceased ('plaintiffs'), namely, RM200,000 G being aggravated/exemplary damages. Hence, the present appeal. The issues that arose for determination were whether the sum of RM200,000 awarded by the HCJ was a reasonable sum or the sum of RM50,000 would have been a more reasonable figure.

H **Held (dismissing appeal with costs)**
**Per Zaleha Yusof JCA delivering the judgment of the court:**

**(1)** The HCJ was correct in taking into account the fact that in *Datuk Seri Khalid Abu Bakar & Ors v. N Indra Nallathamby & Anor*, action was taken against the police officers who caused the death while none was shown I in this instance. Further, the HCJ had properly taken into account the principles governing the assessment of quantum which include the conduct of the parties as stated in *Zulkiply Taib & Anor v. Prabakar Bala Krishna & Ors And Other Appeals*. The object of exemplary damages was

to punish and deter, therefore, the quantum awarded by the HCJ indeed commensurated with the action or omissions of the appellants. The HCJ had not acted upon any wrong principle of law or that the amount awarded was so excessive. In the circumstances, there was no reason to disturb the quantum awarded by the HCJ. (paras 11 & 13)

***Bahasa Malaysia*** *Headnotes*

Chandran Perumal ('si mati') ditangkap pada 6 September 2012 dan ditahan oleh pihak polis kerana disyaki terlibat dalam penculikan bayi yang baru lahir. Dia dijumpai mati di selnya pada 10 September 2012. Bedah siasat mendedahkan bahawa kematian si mati adalah akibat sakit jantung hipertensi. Laporan bedah siasat juga menunjukkan perutnya kosong kerana si mati tidak makan apa-apa dan mengambil apa-apa ubat. Terdapat juga tanda-tanda kecederaan pada mayat si mati. Dalam inkues yang dijalankan atas kematian si mati, koroner memutuskan kematian si mati adalah akibat kecuaian, peninggalan dan keabaian tugas oleh pihak polis. Hakim Mahkamah Tinggi ('HMT') mendapati defendan-defendan ('perayu-perayu') bertanggungjawab atas kecuaian dan misfeasans awam. HMT membenarkan kesemua tuntutan pentadbir sah estet si mati ('plaintif') untuk, antara lain, ganti rugi teladan berjumlah RM200,000. Oleh itu, rayuan ini. Isu yang dibangkitkan untuk pertimbangan mahkamah adalah sama ada jumlah yang diawardkan oleh HMT adalah munasabah atau jumlah RM50,000 adalah lebih sesuai.

**Diputuskan (menolak rayuan dengan kos)**
**Oleh Zaleha Yusof HMR menyampaikan penghakiman mahkamah:**

**(1)** Hakim Mahkamah Tinggi adalah betul apabila mengambil kira fakta bahawa dalam kes *Datuk Seri Khalid Abu Bakar & Ors v. N Indra Nallathamby & Anor*, tindakan telah diambil terhadap pegawai polis yang menyebabkan kematian manakala tiada tindakan diambil dalam hal ini. Selain itu, HMT telah mempertimbangkan prinsip-prinsip yang mengawal penilaian kuantum termasuk kelakuan pihak-pihak seperti yang dinyatakan dalam kes *Zulkiply Taib & Anor v. Prabakar Bala Krishna & Ors And Other Appeals*. Objektif ganti rugi teladan adalah untuk menghukum dan menghalang dan, oleh itu, kuantum yang diawardkan HMT adalah bersesuaian dengan tindakan atau peninggalan perayu-perayu. Hakim Mahkamah Tinggi tidak bertindak berdasarkan prinsip undang-undang yang salah atau jumlah yang diawardkan terlalu tinggi. Oleh itu, tiada sebab mengganggu kuantum yang diawardkan HMT.

**Case(s) referred to:**

*Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal [2014] 9 CLJ 15 CA* ***(refd)***

*Rookes v. Barnard & Ors [1964] AC 1129* ***(refd)***

*Zulkiply Taib & Anor v. Prabakar Bala Krishna & Ors And Other Appeals [2015] 2 CLJ 766 CA* ***(refd)***

*For the appellants - Ruzaimah Mohd Redzuan; SFC*
*For the respondents - M Visanathan; M/s Saibullah MV Nathan & Co*

*[Editor's note: For the High Court judgment, please see Selvi Narayan & Anor (Administrators Of Estate Of Chandran Perumal; Deceased) v. Koperal Zainal Mohd Ali & Ors [2017] 5 CLJ 84 (affirmed).]*

*Reported by Sandra Gabriel*

## JUDGMENT

**Zaleha Yusof JCA:**

**[1]** This is an appeal against the decision of the High Court at Kuala Lumpur which had on 9 January 2017 allowed the plaintiffs' claim for special damages, bereavement, loss of dependency, general and aggravated/exemplary damages, against the defendants for the death of one Chandran a/l Perumal (the deceased) whilst in the custody of the police at its lock-up in IPD Dang Wangi.

**[2]** The first and second plaintiffs are the wife and eldest daughter of the deceased respectively. They are the lawful administrators of the estate of the deceased.

**[3]** The deceased was arrested on 6 September 2012 and detained by the police on suspicion of being involved in the kidnapping of a new born baby. He was found dead in his cell on 10 September 2012. A post mortem revealed that the cause of death was hypertensive heart disease. The report of the post mortem also revealed that his stomach was empty, meaning that he had not eaten any food and taken any medication. There were also signs of injuries on the deceased's body.

**[4]** In the inquest that was conducted into the deceased's death, the coroner had concluded that the deceased had needlessly died and that the death of the deceased was due to the negligence, omission and dereliction of duties on the part of the police. In fact, the learned DPP who assisted in the inquest, in her submission at the end of the inquest had also concluded that the death of the deceased could have been avoided if not for the negligence of the police.

**[5]** The learned High Court Judge in this instant case, after full trial, had found the defendants liable for negligence and public misfeasance. The following is His Lordship's finding:

> 148. In the result, on liability I am satisfied that the plaintiffs have succeeded in proving on a balance of probabilities that the defendants had breached their duty of care which was owed to the deceased and that the death of the deceased was due to their negligence in failing to send the deceased to the hospital for treatment in circumstances where it was

apparent that the deceased was not behaving normally and where the police were already informed either directly or indirectly that the deceased was unwell and required medical attention. As such, I am of the view that liability for negligence (by omission) and public misfeasance has been established against the defendants.

**[6]** His Lordship had allowed all the reliefs sought by the plaintiffs. Following the decision, the appellants filed this appeal. However, we found the appeal was not against liability or the entitlement of any reliefs awarded by the learned High Court Judge. The instant appeal was actually confined to only the quantum of exemplary damages awarded and this was confirmed by the learned Senior Federal Counsel Puan Ruzaimah bt Mohd Redzuan (SFC) when we asked her during her oral submission in the open court. However, for clarity, we reproduce the notice of appeal as follows:

AMBIL PERHATIAN bahawa Koperal Zainal bin Mohd Ali, Koperal Pilot Lanye, Ins Mahezal b. Md Noh, Ins Mohd Saidon bin Shaari, SAC Mohan Singh a/l Tara Singh, Ketua Polis Negara (Tan Sri Ismail Omar pada masa material) dan Kerajaan Malaysia, Perayu-Perayu/Defendan-Defendan yang dinamakan di atas yang tidak berpuas hati dengan keputusan Yang Arif Hakim S. Nantha Balan, yang diberikan di Mahkamah Tinggi Malaya Kuala Lumpur pada 9 Januari 2017 yang membenarkan writ saman dan pernyataan tuntutan Plaintif-plaintif bertarikh 8.9.2015 dengan kos sebanyak RM50,000.00 **dengan ini merayu kepada Mahkamah Rayuan terhadap isu kuantum sahaja iaitu terhadap ganti rugi teladan sebanyak RM200,000.00.** (emphasis added)

**[7]** Hence the issue before us was not whether the plaintiffs were entitled to be awarded exemplary damages but whether the sum of RM200,000 as awarded by the learned High Court Judge was a reasonable sum and not excessive.

**[8]** With due respect to the learned SFC, her submission before us, be it written or oral, was geared towards the principles in awarding exemplary damages, which was not the issue in this appeal. The learned SFC cannot be allowed to raise the entitlement of the said awards as this was not the subject matter of the notice of appeal. When asked what was wrong with the quantum awarded by the learned High Court Judge, the learned SFC merely said the amount was excessive and RM50,000 would be more reasonable, without giving any reason or any authority.

**[9]** On the other hand, the learned High Court Judge had referred to this court's decision in *Datuk Seri Khalid Abu Bakar & Ors v. N Indra P Nallathamby & Another Appeal* [2014] 9 CLJ 15. The learned High Court Judge had put it in the following manner:

164. In *Datuk Seri Khalid Abu Bakar & Ors v. N Indra Nallathamby & Another* [2014] 9 CLJ 15 CA a sum of RM300,000.00 was awarded as exemplary damages. In that case, the deceased was beaten to death by the police

officers. It would be wrong to draw direct parallels with that case because here it has not been proven that the injuries on the deceased were inflicted by the police.

**[10]** His Lordship further stated at para. 176:

> 176 ... The question now is whether the quantum should be at par with what was awarded in the case of *Datuk Seri Khalid Abu Bakar & Ors v. N Indra Nallathamby & Another* [2014] 9 CLJ 15 CA. In that case, a sum of RM300,000.00 was awarded. In so far as this case is concerned, it was established during the trial that no action was taken against any police officers arising out of the death of the deceased. In all the circumstances, I am of the view that a sum of RM200,000.00 would be fair and reasonable as exemplary damages.

**[11]** The learned High Court Judge had taken into account the fact that in *Datuk Seri Khalid*, *supra*, action was taken against the police officers who caused the death while none was shown in this instance. We opined that His Lordship was correct in doing so. The matters to be considered in calculating awards of exemplary damages had been explained by this court in *Zulkiply Taib & Anor v. Prabakar Bala Krishna & Ors & Other Appeals* [2015] 2 CLJ 766; [2015] 2 MLJ 607. At pp. 788-789 (CLJ); p. 629 (MLJ) of the report it was stated:

> Among the matters that the court might properly consider in deciding on the quantum of an award of exemplary damages are discussed in *McGregor on Damages*, (16th Ed), 1997, at p. 306 *et seq*. They include the followings: (a) such awards are to be moderate; (b) the conduct of the parties may properly be taken into account; (c) the quantum of a compensatory award may influence the quantum of an exemplary award; (d) the relevance of any criminal penalty (on the basis that 'punishing twice for the same misconduct offends against the basic principles of justice ...' p. 310, para 467.

**[12]** At para. 90 of the same case, this court had further stated:

> We were reminded of the principle that in order to justify reversing the trial judge's decision on the question of the amount of damages, it will generally be necessary that the court should be convinced either the judge acted upon wrong principle of law, or that the amount awarded was so extremely high or so very small to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled. In other words, it must be plain that no reasonable judge properly applying the relevant principles could have awarded so large a sum.

**[13]** We further opined the learned High Court Judge had properly taken into account the principles governing the assessment of quantum which include the conduct of the parties as stated in *Zulkiply*, *supra*. Bearing in mind the object of exemplary damages is to punish and deter (see *Rookes v. Barnard & Ors* [1964] AC 1129), we found the quantum awarded by the learned High Court Judge was indeed commensurate with the action or omissions of the

defendants. We were not convinced that the learned High Court Judge had either acted upon wrong principle of law or that the amount awarded was so excessive. We therefore found no reason to disturb the quantum awarded by the learned High Court Judge.

**Conclusion**

**[14]** For those reasons, we dismissed the appeal with costs of RM10,000.